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No. 16-9493

In the Supreme Court of the United States

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SUPREME COURT, U.S.

FLORENCIO ROSALES-MIRELES, *PETITIONER*,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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INTRODUCTION

Petitioner Florencio Rosales-Mireles asks the Court to grant a writ of certiorari to resolve a circuit split over the proper standard for applying the fourth prong of plain error review. Here, Rosales argued that the district court plainly erred in calculating his Sentencing Guidelines range. The court of appeals held that there was error and that the error was plain and affected Rosales's substantial rights. But the court declined to exercise its discretion to correct the plain error on the ground that it was not one that would "'shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge.'" Pet. App. 4. The Fifth Circuit's fourth-prong standard conflicts with other circuits' approach to plain Guidelines errors, as well as with this Court's decision in *United States v. Olano*, 507 U.S. 725 (1993).

The Government urges the Court to deny Rosales's petition, arguing that the Fifth Circuit's decision is correct; any difference among the circuits results from variations in the exercise of fourth-prong discretion, rather than a dispute over the standard for exercising that discretion; and Rosales's case is an unsuitable vehicle for addressing the question presented. Rosales replies.

ARGUMENTS AND AUTHORITIES

I. The Fifth Circuit's Heightened Standard of Plain Error Review is Erroneous.

The Government argues that the Fifth Circuit's refusal to correct the plain error in this case was merely an exercise of the court's broad discretion. B.I.O. 6–10. The Government acknowledges that the Fifth Circuit applied "two formulations" of the fourth-prong, but argues that Rosales failed to explain how the outcome would have been different had the Fifth Circuit not applied the extra "gloss" that the error must "shock the conscience" to warrant relief. B.I.O. 9–10. The Government is wrong.

The Fifth Circuit determined that "no discrepancy" exists, and thus relief is not warranted, because the sentence falls within an overlap between the correct and incorrect Guidelines ranges. Pet. App. 4. The Government argues that Rosales failed to explain how he would have succeeded had the court "omitted its gloss." B.I.O. 9–10. However, the Government acknowledged that Rosales had cited cases where the Fifth Circuit did not apply the heightened standard and vacated sentences that fell within overlapping Guidelines ranges or had the similar degree of error. B.I.O. 11; *see also* Pet. 10–11. Indeed, for a case like Rosales's, where the sentence imposed falls within overlapping Guidelines ranges, it is the heightened standard that affected the outcome. *Compare Rosales*,

850 F.3d 246 (affirming sentence with 7-month discrepancy), *with United States v. Molina-Martinez*, 824 F.3d 548 (5th Cir. 2016), *on remand from* 136 S. Ct. 1338 (2016) (vacating sentence with 7-month discrepancy). *See* Pet. 10–11.

II. The Government Underestimates the Significance of the Inconsistent Applications of the Plain Error Standard.

The Government does not dispute that "tension" exists between the courts of appeals in how to apply the fourth prong. B.I.O. 13–15. Nor does it cite to any circuits that apply the same heightened standard as the Fifth Circuit. But the Government contends that any disparity in plain-error outcomes between the Fifth Circuit and other courts of appeals "is largely attributable to differences in how those courts choose to exercise their discretion, rather than disagreements over the legal standards for plain error." B.I.O. 14. This is a distinction without a difference. How courts choose to exercise their discretion depends on the standard applied to the fourth prong.

The cases cited by Rosales and the Government highlight the broad extremes in the standards applied by courts of appeals under the fourth prong when Guidelines errors exist. Pet. 9–11; B.I.O. 13–15. On one hand, the Fifth Circuit applied a heightened "shocks the conscience" standard, traceable to a dissenting opinion that eliminates relief to petitioners, like Rosales, whose sentence

falls within an overlap between Guidelines ranges. Pet. App. 4. On the other hand, the Tenth Circuit applies a presumption that relief is granted when Guidelines errors are committed. B.I.O. 13 (citing *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014)). The existence of wide variation in sentencing outcomes is evidence, not of a singular standard applied to specific cases, but the application of distinct legal standards.

Courts of appeals are not entitled to apply plain error review in idiosyncratic ways, which is why this Court has granted certiorari in recent years to resolve circuit splits over application of the plain error standard. *See Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016); *Henderson v. United States*, 133 S. Ct. 1121 (2013). The Government has provided no authority, nor any good reason, why courts of appeals should be allowed to apply the fourth prong of the plain-error standard in drastically different ways. Rather, the fact that such variation exists is a traditional and appropriate reason for this Court to exercise its certiorari jurisdiction.

III. Rosales's Case is a Good Vehicle for Resolving the Question Presented.

The Government argues that this case is not a good vehicle for resolving the question presented, for two reasons. First, the Government argues that there is "no discrepancy" in this case because Rosales's sentence falls within an overlap between the correct and

incorrect Guidelines ranges. B.I.O. 16. Cases that involve overlapping ranges exaggerate the effect of the circuit split. Under the Fifth Circuit's "shocks the conscience" standard, such cases are barred from relief. If that same defendant were to be sentenced in the Tenth Circuit, the defendant receives a presumption that relief will be granted. *See Sabillon-Umana*, 772 F.3d at 1333.

Second, the Government argues that Rosales would have received the same sentence absent the error. B.I.O. 16. The Government's assertion directly conflicts with the Fifth Circuit's finding on the third prong of plain error—that the error affected Rosales's substantial rights—because there was insufficient evidence to conclude that he would have received the same sentence had the district court considered the correct Guidelines range. *Rosales*, 850 F.3d at 249.

In sum, this petition raises an important question respecting the application of the plain-error doctrine of Rule 52(b) in the context of Sentencing Guidelines errors. The Fifth Circuit's answer to that question directly conflicts with the answer given by the Third, Ninth, and Tenth Circuits. Accordingly, the Court should grant certiorari to resolve this question.

CONCLUSION

For these reasons, Rosales asks the Court to grant a writ of certiorari.

Respectfully submitted.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, a member of the Bar of this Court, certifies that pursuant to Rule 29.3, Supreme Court Rules, she served the Reply to the Brief for the United States of America in Opposition on the Counsel for Respondent by electronic mail and by enclosing one copy in an envelope, with first-class postage prepaid, addressed to counsel of record at his post office address:

The Honorable Jeffrey B. Wall
Acting Solicitor General of the United States
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and depositing same in a United States mailbox at San Antonio, Texas, on August 22, 2017; and further certifies that all parties required to be served have been served.

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